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NTSB Order No. EA-4174

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 14th day of May, 1994

_____	)	
DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Dockets SE-12722
v.	)	SE-12769
	)	
DOUGLAS R. McINTOSH,	)	
JOHN M. SPRIGGS,	)	
Respondents.	)	
_____	)	

**OPINION AND ORDER**

Both respondents have appealed from the oral initial decision issued by Administrative Law Judge Jerrell R. Davis at the conclusion of an evidentiary hearing held in these consolidated cases on December 9, 1992.<sup>1</sup> In that decision, the law judge affirmed orders suspending both respondents' pilot certificates based on their failure to comply with an air traffic

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<sup>1</sup> Attached is an excerpt from the hearing transcript containing the oral initial decision.

control (ATC) altitude clearance, in violation of 14 C.F.R. 91.13(a) and 135.21 (both respondents) and 91.123(a) (respondent McIntosh only).<sup>2</sup> Actual suspension of the certificates was waived pursuant to the Aviation Safety Reporting Program (ASRP). For the reasons discussed below, we deny both appeals.

This incident occurred while respondent McIntosh served as the non-flying pilot-in-command and respondent Spriggs, acting as co-pilot, operated the controls of the aircraft on United Express

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<sup>2</sup> Section 91.13(a) provides:

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 135.21(a) provides, in pertinent part:

**§ 135.21 Manual requirements.**

(a) Each certificate holder, other than one who uses only one pilot in the certificate holder's operations, shall prepare and keep current a manual setting forth the certificate holder's procedures and policies acceptable to the Administrator. This manual must be used by the certificate holder's flight, ground, and maintenance personnel in conducting its operations.

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Section 91.123(a) provides:

**§ 91.123 Compliance with ATC clearances and instructions.**

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. A pilot in command may cancel an IFR flight plan if that pilot is operating in VFR weather conditions outside of positive controlled airspace. If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

flight 2465 (operated by WestAir Commuter Airlines, Inc.) enroute from Medford, Oregon to Portland, Oregon. As the non-flying pilot, it was Captain McIntosh's responsibility to communicate with ATC, to enter assigned altitudes into the aircraft's altitude alerter device,<sup>3</sup> and to ensure that co-pilot Spriggs was aware of all ATC altitude clearances. Pursuant to the WestAir operations manual, both pilots were required to "make altitude awareness a very high priority at all times," and to give primary consideration to maintaining altitudes specified in ATC clearances. (Exhibit C-9.)

The record indicates that, shortly after departure, respondent McIntosh acknowledged an ATC clearance to climb to 14,000 feet, and entered this altitude into the altitude alerter.

It is clear from unrebutted evidence in the record that the flight deviated from that clearance and ascended to 14,700 feet before the error was corrected, resulting in a loss of standard separation with another aircraft.<sup>4</sup> The law judge concluded that

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<sup>3</sup> The altitude alerter is designed to sound a tone 250 feet before reaching the pre-set altitude, and again at 250 feet after passing through it. Respondent McIntosh testified he was unable to hear the tone emitted from most of the alerters used on the company's aircraft and, accordingly, used the device primarily as a visual reminder of the assigned altitude. Co-pilot Spriggs stated that he was able to hear the tone but took the position that the tone had not sounded because, subsequent to the admitted 14,000 foot clearance, respondent McIntosh entered 16,000 feet into the device.

<sup>4</sup> Though respondent Spriggs asserted at the hearing that he recalled hearing an intervening clearance to 16,000, the law judge found this testimony to be patently inconsistent with the tapes and the transcript of relevant ATC communications. Respondent Spriggs does not pursue this position on appeal.

respondents failed adequately to monitor their altitude and their compliance with the ATC clearance, and indicated that, regardless of the explanations offered by respondents, the result reflected less than the highest degree of care.<sup>5</sup> (Tr. 324.)

Respondents, who are represented by separate legal counsel, make divergent arguments on appeal. Respondent McIntosh essentially denies that he breached the applicable standard of care, and argues that he was entitled to rely on his co-pilot to comply with the clearance while he (McIntosh) was engaged in what he characterizes as another essential safety duty. Respondent Spriggs, on the other hand, does not directly address the circumstances of the deviation but, rather, bases his appeal on an allegedly inadequate discovery response by the Administrator, and on alleged deficiencies in the Administrator's evidence regarding a required ATC notice to the pilots of the deviation.

The appeals are addressed separately below.

Pilot-in-command McIntosh.

Respondent McIntosh has maintained throughout this proceeding that the altitude deviation occurred while he was dealing with a passenger who had approached him and asked whether she could change seats, and attributes his failure to monitor the co-pilot's compliance with the clearance during that time solely to that distraction. Respondent McIntosh conceded that he probably did not make altitude call-outs at 1,000 feet and 500

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<sup>5</sup> The law judge's reasoning is consistent with that in Administrator v. Frederick and Ferkin, NTSB Order No. EA-3600 (1992).

feet prior to reaching the assigned altitude,<sup>6</sup> as required by the WestAir operations manual, but attributed this lapse as well to the passenger distraction. He notes that there is no requirement for flight attendants on the 19-passenger aircraft used in this operation and, hence, company policy dictates that the non-flying pilot is responsible for responding to passenger needs, problems, inquiries, etc. Indeed, there was un rebutted testimony that the company-approved pre-flight passenger briefing actually encourages passengers to address any questions or problems they may have to the pilots in the cockpit. McIntosh characterizes this as an essential duty related to flight safety which required his immediate attention,<sup>7</sup> and argues that he was entitled to rely on his co-pilot to properly perform his duties while he was engaged in this activity.

We have often emphasized that the pilot-in-command of a passenger-carrying flight in air transportation is held to the highest degree of care.<sup>8</sup> Consistent with this high degree of

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<sup>6</sup> It is evident from the record that respondent McIntosh also failed to comply with the company operations manual by calling out the aircraft's altitude 100 feet after passing through the assigned altitude.

<sup>7</sup> Respondent McIntosh asserts that a "passenger may conceivably wish to report smoke, fire, ice, mechanical problem, heart attack or other medical problem, or even criminal activity" (App. Br. at 24), and maintains that each passenger inquiry must be presumed to be a potential emergency. He also claims that he could not have known the nature of the passenger's problem in this case until after he took the time to turn around, remove his headphones, and listen to her request.

<sup>8</sup> See Administrator v. Dillon, NTSB Order No. EA-4132 at 5 n. 12 (1994), citing Administrator v. Baughman, NTSB Order No. EA-3563 at 3, n. 7 (1992), and Administrator v. Moore, NTSB Order

care, it is not unreasonable to expect such a pilot to appropriately prioritize, and fulfill, competing duties. As we made clear recently in Administrator v. Dillon, NTSB Order No. EA-4132 at 4 (1994), the pilot-in-command has both a general duty, as articulated in our case law, to monitor the safety of the flight; and a specific duty, pursuant to section 91.123(a), to insure compliance with ATC altitude clearances. Further, as in Dillon, respondent in this case also had a company-imposed duty to monitor and call out the aircraft's altitude as it approached its assigned altitude and to call out any deviation from that altitude.

Common sense indicates, and our case law confirms, that a pilot's duty to monitor altitude during ascent and descent to insure compliance with an ATC clearance is fundamental, and certainly among those most vital to flight safety.<sup>9</sup> This is so regardless of whether the altitude change occurs during a "critical phase of flight," as that term is used in 14 C.F.R. 135.100.<sup>10</sup> Responding to a passenger inquiry, unless clearly of

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No. EA-3946 at 6, n. 14 (1993).

<sup>9</sup> See Administrator v. Dillon, NTSB Order No. EA-4132 (1994); Administrator v. Frederick and Ferkin, NTSB Order No. EA-3600 (1992); and Administrator v. Van Valkenberg, NTSB Order No. EA-3281 at 7 (1991).

<sup>10</sup> Section 135.100 (known as the "sterile cockpit rule") prohibits crewmembers from engaging in or permitting any distracting activity during a critical phase of flight. Critical phases of flight include all ground operations involving taxi; takeoff and landing; and all other flight operations conducted below 10,000 feet, except cruise flight. 14 C.F.R. 135.100(c).

Respondent argues that section 135.100 cannot be extended to

an urgent or emergency nature, cannot take priority over this fundamental duty. Though respondent would have us believe that he had no choice but to hear the passenger out and respond to her request -- a process which, by respondent's own estimation, consumed at least 45 seconds<sup>11</sup> -- we agree with the FAA inspector who indicated that, under those circumstances, such a lengthy response was unwarranted and unwise.<sup>12</sup> In sum, we cannot agree that respondent McIntosh was justified in abandoning his duty to monitor the aircraft's altitude while it was in a climbing mode, simply so that he could respond promptly and courteously to a passenger's request.

As for respondent McIntosh's claim that he cannot be faulted for any lack of attention because he noticed the deviation immediately upon turning back to the instrument panel after his discussion with the passenger, and instructed co-pilot Spriggs to correct the error even before ATC reminded the crew to "maintain [14,000]" (App. Br. at 9-10, 23), we note that the record

(..continued)  
phases of flight other than those specified in that rule except through formal rulemaking. However, our decision in this case does not constitute an extension of the sterile cockpit rule.

<sup>11</sup> Assuming, as respondent's testimony suggests, that the passenger occupied his attention from the time they passed 13,000 feet (when he would have been required to make the 1,000-foot call-out) until they had reached 14,700 feet, at a climb rate of 1,100-1,200 feet per minute, the distraction actually would have lasted approximately a minute and a half.

<sup>12</sup> The inspector suggested that respondent could have offered an abbreviated response to the passenger's question, or simply advised her that he was busy at the moment. (Tr. 155-56.) He also implied that, in respondent's place, he might have made no response at all until after the assigned altitude had been safely reached. (Tr. 158, 160, 168-69.)

provides little support for this version of the events. Indeed, McIntosh's recollection was directly contradicted by the testimony of co-pilot Spriggs, who testified that the first indication he had of the deviation was "[w]hen the controller's voice came on and said . . . maintain [14,000]." (Tr. 255-56.) In an apparent attempt to reconcile the differing accounts, the law judge recalled McIntosh for further questioning. When McIntosh insisted that Spriggs' testimony indicated that he (Spriggs) reacted simultaneously to ATC's reminder and to McIntosh's comment on the altitude deviation, and opined that -- contrary to Spriggs' own testimony -- Spriggs heard and reacted to McIntosh before he reacted to ATC, the law judge stated that he was beginning to question the credibility of McIntosh's testimony in general. (Tr. 279-83.)

Finally, we note that this flight's responses to radio transmissions from ATC also tend to suggest that it was ATC which first alerted the crew to the deviation. The transcript of communications indicates that ATC's first notification to the flight of their deviation ("Sundance [2465] maintain [14,000]") was met with an immediate "Yes sir," presumably from respondent McIntosh. It was only in response to the second ATC transmission ("Sundance [2465] say your altitude"), which came six seconds after the first, that respondent McIntosh stated "Uh fourteen four we're correcting sir." (Exhibit C-2.)

Respondent McIntosh makes several other contentions, none of which warrant serious discussion. He claims that a remand is



required because the law judge failed to address his "reasonable reliance" defense. However, to the extent that the doctrine of reliance is applicable to this case, we think the law judge's decision can fairly be read as rejecting respondent's claimed reliance as unreasonable. Nor do his complaints regarding the sufficiency of the evidence and the Administrator's discovery responses in this case provide any basis for disturbing the initial decision.

Co-pilot Spriggs.

*Faulty ATC tape.* During pre-trial discovery, the FAA provided respondents with a copy of the re-recording of relevant ATC transmissions. At the hearing, when the original re-recording was played, it became evident that certain transmissions on the tape supplied to respondents were poorly reproduced and, during one section lasting approximately one minute and 15 seconds, totally inaudible. Respondent Spriggs asserts that this amounted to willful non-compliance with discovery, and complains that he was prejudiced thereby in that he based his defense on the tape he was given. Specifically, respondent Spriggs claimed at the hearing that he believed he had heard an ATC clearance for his aircraft to ascend to 16,000 feet, and that this alleged clearance was received during the minute and 15 seconds which appeared on his tape to be blank. The original re-recording introduced by the Administrator (Exhibit C-1) made clear, however, that during the disputed time period ATC had not issued them a clearance to that level, but had only

instructed respondents' flight to "expect higher to [16,000] in about two minutes . . . " (Exhibit C-2.) Respondent asks us to sanction the Administrator's alleged non-compliance with discovery by reversing the initial decision and dismissing the complaint in this case. In our judgment, the Administrator's failure to provide respondents with a better tape recording does not amount to the sort of contumacious conduct we have found deserving of sanctions in the past.<sup>13</sup> There is no issue of non-compliance with a discovery order, as one was not issued in this case, nor does the record support a finding that the Administrator's discovery lapse in failing to ensure the adequacy of the tape was deliberate. Furthermore, inasmuch as all the transmissions critical to establishing the deviation were present on the tape provided to respondent, we agree with the Administrator and the law judge that respondent was not prejudiced by the absence of other, essentially extraneous, transmissions on the tape.<sup>14</sup>

In sum, although the Administrator's production of the faulty tape might have provided grounds for a continuance so that respondent Spriggs could re-evaluate his defense, it does not warrant the drastic action requested.

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<sup>13</sup> Administrator v. Henry, 5 NTSB 858 (1985); Petition of Seiler, 3 NTSB 3327, 3329 (1981).

<sup>14</sup> We note that, even after hearing the original re-recording at the hearing, respondent persisted in his claim that he had heard a clearance to 16,000 feet, and conceded that his recollection was not supported by either of the tapes or by the transcript of ATC transmissions. (Tr. 265-68.)

*ATC notice of the deviation.* Respondent Spriggs also challenges the Administrator's alleged failure to prove by competent evidence that ATC followed its own policy by giving respondents notice of the deviation using standardized terminology,<sup>15</sup> and claims that this alleged failure warrants reversal of the initial decision. Specifically, respondent argues that the law judge impermissibly relied on double hearsay, and improperly allowed the Administrator to recall a witness. This argument fails for several reasons.

The issue of ATC notice was never raised by either respondent in this proceeding, but was raised for the first time by the law judge when, at the conclusion testimony by the Administrator's ATC witness, the law judge inquired whether the required notice had been given. (Tr. 109-13.) The witness indicated that she would have to call her office to ascertain from files kept there whether the notice had been given. Following the lunch break the Administrator recalled this witness and she testified that, upon calling her office, she was told that official paperwork there confirmed that the proper notice was given. We think the Administrator presented sufficient prima facie evidence to support a finding that the required notice was given.<sup>16</sup> This evidence remains unrebutted, as neither respondent

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<sup>15</sup> See Administrator v. Brasher, 5 NTSB 2116 (1987).

<sup>16</sup> We note our recent ruling that double hearsay may be admitted and relied upon in our proceedings, if there are sufficient indicia of reliability and the interests of justice will best be served by its admission. Administrator v. Repacholi, NTSB Order No. EA-3888 (1993).

has made any claim that the required notice was not given.<sup>17</sup>

In any event, given either respondent's failure to notify the Administrator this issue would be contested, they cannot fairly claim that the evidence produced was too weak.

Finally, we note that even if the proper ATC notice was not given, it would not change the result in this case, since respondents have already been granted a waiver of sanction pursuant to the ASRP. We have made clear that the remedy for non-compliance with the notice requirement is to impose no sanction for the violation, not dismissal of the charges.

Administrator v. Ridpath, NTSB Order No. EA-3068 (1990).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondents' appeals are denied;
2. The initial decision is affirmed; and
3. The suspensions of respondents' pilot certificates, with waiver of penalty, are hereby affirmed.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>17</sup> Respondent Spriggs' challenge on appeal is a purely evidentiary one.